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Before the
FEDERAL COMMUNICATIONS COMMISSION

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Federal Communications Commission
Office of the Secretary

In the Matter of Network Enhanced Telecom, LLP Petition For Declaratory Ruling	)))	WC Docket No.________

To: Chief, Wireline Competition Bureau

Petition for Declaratory Ruling

Network Enhanced Telecom, LLP ("NET"), by its attorneys, respectfully petitions the Federal Communications Commission ("FCC" or Commission") for a declaratory ruling to clarify that (1) compliance with the Commission's payphone compensation rules creates a safe harbor from further liability for payphone compensation; and (2) transmission of payphone-specific coding digits is a prerequisite for compensation. Such a clarification will minimize the vexatious litigation that continues despite the Commission's fulsome and costly payphone compensation regulatory framework.

Introduction

The FCC has promulgated a rigorous, detailed and comprehensive regulatory structure to ensure that owners of payphones, called payphone service providers ("PSPs"), are fairly compensated for completed calls, as required by the 1996 Telecommunications Act ("Act"). The FCC found that this structure is "more than sufficient to ensure that [payphone] calls do not go uncompensated."[1/] Nevertheless, compliance with the FCC's extensive requirements, which the agency recognized entails "substantial expenses," provides no relief from harassment and vexatious litigation by payphone owners harboring suspicions that they have not been fully compensated. This needs to change. Demonstrated compliance with the FCC's elaborate

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1/ *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 19 FCC Rcd 21457, ¶ 29 (2004).

regulatory structure, which is designed to ensure that companies compensate payphone owners, should provide a safe harbor, shielding companies from payphone owners' claims that they have not been paid for completed calls.

This is an issue of critical importance to NET, a small company headquartered in Longview, Texas. NET has invested substantial resources to comply with the FCC's directives. It has developed a state-of-the-art system fully capable of identifying and tracking payphone calls to ensure that payphone owners are appropriately compensated. As required by the rules, NET has hired independent auditors to assess its systems and has in each instance obtained an opinion that its systems accurately and reliably track payphone calls. The company pays hundreds of thousands of dollars to payphone owners each quarter and, as required by FCC rules, its chief financial officer certifies to the best of her knowledge that the company has paid for all completed payphone calls.

Despite shouldering the significant costs and burdens of the FCC's regulatory regime, compliance with those rules has not shielded the company from claims by payphone providers that it has failed to pay them for all completed calls. These claims are accompanied by demands that the company undertake burdensome and detailed analyses of its call record data to demonstrate that it has in fact paid for all completed calls. The payphone providers typically threaten to initiate litigation if the demands are not met, and have initiated litigation when unsatisfied. The company has devoted enormous time and resources to provide information that merely confirms what auditors had already found – that NET's systems accurately capture all properly identified payphone-originated calls and are designed to ensure that all completed calls are compensated.

The ability of NET, or any other completing carrier, to comply with the compensation scheme is wholly dependent upon the transmission of payphone-specific coding digits that identify the call as originating from a payphone. Without these digits, completing carriers have no way to identify and tag a payphone-originated call on a real-time basis. The Commission has long required PSPs and the local exchange carriers serving their phones to pass payphone-specific coding digits. The Commission should confirm that coding digits are a prerequisite to completing carriers' compensation obligations – payphone-originated calls that are not accompanied by payphone-specific coding digits are not entitled to compensation by completing carriers. Completing carriers thus should be under no obligation to ferret out calls that may have originated from a payphone but did not include a payphone-specific coding digit. The Commission should further declare that completing carriers cannot be held liable where intermediate carriers have altered or stripped the coding digits, or otherwise masked the nature of the call as coming from a payphone.

I. Compliance with the FCC's Safeguards Should Create a Safe Harbor

Demonstrated compliance with the Commission's regulatory structure should create a safe harbor protecting companies from claims asserting a failure of compensation. By demonstrated compliance, NET means that the company has obtained an opinion from an independent auditor attesting that its systems and operations comply with the rules, that the company has filed the requisite reports and certifications as required by the FCC's rules, and that the company has made payments to PSPs for all the completed calls captured by its system as confirmed by the audit. As explained below, establishing a safe harbor is fully justified given the extraordinary detail of the FCC's rules governing the conduct of audits and other aspects of payphone compensation.

A. Compliance with the FCC's Comprehensive Regulatory Regime Ensures Accurate Recordkeeping and Timely Payment of Payphone Compensation

The FCC requires companies that complete payphone calls over their equipment to "establish [their] own comprehensive call tracking system" to analyze call information, and to "produce accurate reports" on the calls.[2] They then are required to compensate payphone owners for each completed call. The FCC requires companies to hire an independent auditor to "verify the accuracy and reliability" of the call tracking system, file copies of the auditor's report with the FCC, and make it available to payphone owners.[3] The audit must follow the standards established by the American Institute for Certified Public Accountants ("AICPA") and the auditor must issue an opinion "regarding the accuracy and reliability" of the call tracking system.[4] The rules further specify a number of factors that the auditor must verify in its report, including that the company: (1) has procedures that "accurately track calls to completion"; (2) has "effective data monitoring procedures"; (3) has created a file for payphone calls that must be paid; (4) has designated persons responsible for ensuring payments are made and adopted procedures to resolve disputes; (5) has "adequate and effective" business rules to ensure that calls can be identified as coming from a payphone, and that calls are completed and thus compensable or incomplete and thus not compensable; and (6) that the auditor can "test all critical controls and procedures to verify that errors are insubstantial."[5]

In compliance with AICPA standards for these types of audits, the audit report must

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2/ *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975, ¶ 38 (2003) ("*Tollgate Order*"); *see also* 47 C.F.R. § 64.1310(a)(1) (2007); 47 C.F.R. § 64.1320 (2007).

3/ *Tollgate Order* ¶ 38; *see also* 47 C.F.R. § 64.1320 (2007).

4/ *Tollgate Order* ¶ 39; *see also* 47 C.F.R. § 64.1320(d) (2007).

5/ 47 C.F.R. § 64.1320(c) (2007).

include a representation by the company that it is in compliance with the FCC's requirements and the auditor's independent opinion concerning that representation. The audit report must specify whether the company's representation is complete and accurate or disclose any failure of compliance. The rules require companies to undertake audits each year verifying that there has been no material change in the company's compliance since the previous audit, or if there have been material changes in the company's systems or procedures, that those changes comply with the FCC's requirements. Companies must file the annual audit report with the FCC and make it available to payphone owners and to long distance carriers from whom the company receives payphone calls. Subject to protections safeguarding confidential information, companies must allow requesting payphone owners to inspect and copy "all documents, including underlying work papers" that form the basis of the auditor's opinion.[6/]

In addition to establishing comprehensive systems and operations to identify and compensate payphone owners, the FCC rules require companies to include specific information when they make their payments to the payphone owners. Companies must send to payphone owners a report that includes the following information: (1) a list of toll-free numbers or access code numbers (*e.g.*, an 800 number) that were dialed from each of the payphone owner's payphones and the phone number of the payphone itself; (2) the volume of calls from the payphone to each of the toll-free or access code numbers dialed; (3) the name, address and phone number of the person(s) at the company responsible for ensuring compensation is paid; and (4) the identity of each long distance company that sent payphone-originated calls to the company cross-referenced to the list of toll-free and access code numbers.[7/] The rules also require the

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6/ *Tollgate Order* ¶¶ 40, 44.

7/ *Tollgate Order* ¶ 44.

company's chief financial officer to provide a sworn declaration certifying that the payment amount is accurate and is based on 100 percent of actual calls completed.

The rules described above apply to carriers that complete calls. The FCC's regulatory structure also imposes obligations on long distance companies that own or lease a switch and transfer payphone-originated calls to other carriers. Such carriers, called intermediate carriers, must provide to payphone owners each quarter a report that: (1) lists all the "facilities-based long distance carriers" to which the intermediate carrier sent toll-free and access code calls; (2) a list of access code numbers and toll-free numbers that were sent to each identified facilities-based long distance carrier; (3) the volume of calls for each toll-free or access code number that the intermediate carrier received from each payphone and then sent on to another carrier; and (4) the name, address and telephone number and other identifying information of the intermediate carrier's contact at carriers to which it sent calls.[8]

B. Compliance Should Create a Safe Harbor

Once a company has obtained an opinion from an independent auditor verifying that its systems and procedures comply with the exhaustive requirements set forth above, that is, that it accurately and reliably identifies compensable payphone calls, the company should be shielded from payphone owners' claims. As it currently stands, compliance with the FCC's rigorous and costly regulatory structure offers no protection either from litigation, or from further, often onerous, information requests. The threats of litigation often are designed to intimidate smaller companies into settlements.

The FCC should put a stop to these extortionate fishing expeditions by establishing a safe harbor shielding from liability completing carriers that have demonstrated compliance.

8/ *Tollgate Order* ¶ 51.

Congress and administrative agencies, including the FCC, have often established safe harbors built around regulatory compliance.[9/] Similarly, the Commission here should establish a safe harbor that shields completing carriers from liability for payphone compensation if they have: (1) developed a system capable of tracking payphone calls as verified by a "clean" audit report from an independent accounting firm as required by 47 C.F.R. § 64.1320, and distributed those reports as required; (2) provided payphone providers or their clearing houses with the information required by 47 C.F.R. § 64.1310(a)(4); (3) verified that the payment amounts are accurate through a certification by the company's chief financial officer; and (4) timely made payments consistent with data captured by the company's tracking system as verified by the annual audit.

Demonstrated compliance with these factors, which are readily and objectively confirmed, should provide immunity from further compensation claims. A payphone operator could overcome this immunity only by presenting specific and concrete evidence that a completing carrier has failed to remit the required compensation. The Commission should make clear that a discrepancy between the number of calls sent to a completing carrier by an intermediate carrier and the number of compensated calls is insufficient. There will always be a discrepancy between these numbers because intermediate carriers report all payphone calls sent whereas completing carriers only pay for those calls that are actually completed.

9/ *See, e.g.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, ¶ 38 (2003) (showing that sellers or telemarketers are not liable for violating do-not-call rules if they can demonstrate compliance with five specific regulatory obligations); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1098-99 (W.D. Wash. 2004) (reiterating that the Digital Millennium Copyright Act protects Internet service providers from copyright liability if such providers comply with regulatory requirements); *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229 (9th Cir. 2001) (explaining that compliance with an Incidental Take Statement issued by the Fish and Wildlife Service provides a safe harbor from liability).

II. Payphone Coding Digits Are a Prerequisite for Compensation

The FCC's payphone compensation scheme cannot function unless payphone owners and their serving local exchange carriers ("LECs") transmit digits that specifically identify the call as coming from a payphone. The FCC consistently has recognized that coding digits are essential to ensuring that "all payphone service providers are fairly compensated for each and every completed intrastate and interstate call."[10/] In the initial orders establishing the payphone compensation regime, the Commission imposed the "requirement that . . . LECs transmit payphone-specific coding digits to PSPs, and that PSPs transmit those digits from their payphones to IXCs" and stated that "[t]he provision of payphone-specific coding digits is a prerequisite to payphone per-call compensation payments by IXCs to PSPs."[11/] Further orders reiterated that "for payphones to be eligible for compensation, payphones will be required to transmit specific payphone coding digits."[12/] LECs and PSPs are "required to provide this information needed by IXCs to identify compensable calls from payphones for per-call compensation."[13/]

As the FCC has recognized, the entire payphone compensation system depends upon the ability of LECs and PSPs to transmit proper coding digits, which indicate calls as payphone calls. Absent proper coding digits, completing carriers cannot capture payphone call information in real-time, which is the only efficient method of ensuring compensation. Carriers should not be expected to determine, sometimes years after the fact, whether a call originated from a

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10/ 47 U.S.C. § 276(b)(1) (2006).

11/ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 4998, ¶ 13 (1998).

12/ *Id.* (internal quotations omitted)

13/ *Id.*

payphone when such a call did not contain a payphone-specific digit. Such a practice not only imposes enormous costs by requiring carriers to engage in call record archeology, but it precludes the ability to pass through payphone surcharges. For example, if an end user places a payphone call using a prepaid calling card and payphone-specific coding digits are not transmitted with the call, the carrier has no way of knowing that a payphone surcharge, which is used to compensate the PSP, needs to be deducted from the card. In this instance, the carrier is left without recourse. Payphone-specific coding digits are essential to ensuring that PSPs can be compensated for each and every completed call.

Although the Commission at one time granted waivers from the coding digit requirement while PSPs and carriers developed and installed the technology needed to pass and detect coding digits, those waivers expired almost a decade ago. The technology is or certainly should be in place today to transmit payphone-specific coding digits. The Commission thus should reaffirm that the existence of such digits is, in fact, a prerequisite for compensation and that completing carriers should not be required to rummage through their records to determine whether calls received without those digits may nevertheless have originated from a payphone. The Commission should confirm as well that only payphone-*specific* coding digits qualify. Coding digits that may identify a call as coming from a payphone but also from another source, such as a hotel telephone, are insufficient to trigger a compensation obligation.[14/]

Finally, the Commission should confirm that completing carriers cannot be liable for payphone compensation if the call originates with payphone-specific coding digits but those digits are not passed along by intermediate carriers or an intermediate carrier takes steps to mask

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14/ Industry standard coding digits identifying calls as payphone calls are "70" and "27." Coding digits "07" (which refers to any operator assisted call) or "00" (which is a default code) are not sufficient to designate calls as payphone calls.

payphone calls. Here liability, if any, should lie with the intermediate carrier that failed to process or pass along the coding digits.

Conclusion

For the foregoing reasons, NET respectfully requests that the Commission grant the relief requested herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jennifer A. Cukier, hereby certify that on this 28th day of October, 2008 a copy of the foregoing Petition for Declaratory Ruling was served on the following by the method indicated below:

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